

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
DONNIE BARNES, SR.,  
Defendant.

NO. CR18-5141 BHS

**GOVERNMENT'S MOTION IN  
LIMINE TO EXCLUDE IMPROPER  
REFERENCES TO PUNISHMENT**

NOTING DATE: October 29, 2019

The United States of America, by and through Brian T. Moran, United States Attorney for the Western District of Washington, and Matthew P. Hampton and Lyndsie R. Schmalz, Assistant United States Attorneys for said District, hereby submits this motion *in limine* to preclude the presentation of evidence or argument referring to the potential custodial punishment or other collateral consequences the Defendant faces if found guilty. The government has conferred with counsel for the defense, who have indicated that, at this time, they have made no decision regarding whether they plan to present such evidence or argument to the jury.

**I. ARGUMENT**

Any argument related to the potential penalty that could be imposed, or the collateral consequences of a conviction, should be excluded as irrelevant and prejudicial.

1 A jury's sole function in a criminal prosecution is to determine guilt or innocence; it does  
2 not impose sentence. As the Supreme Court held in *Shannon v. United States*:

3 The principle that juries are not to consider the consequences of their  
4 verdicts is a reflection of the basic division of labor in our legal system  
5 between the judge and jury. The jury's function is to find the facts and to  
6 decide whether, on those facts, the defendant is guilty of the crime charged.  
7 The judge, by contrast, imposes sentence on the defendant after the jury has  
8 arrived at a guilty verdict. Information regarding the consequences of a  
9 verdict is therefore irrelevant to the jury's task.

10 512 U.S. 573, 579 (1994); *see also United States v. Sherpa*, 97 F.3d 1239, 1244–45 (9th  
11 Cir. 1996) (“[S]entencing is the province of the judge, not the jury”).

12 This understanding of the jury's role is expressly addressed in the Ninth Circuit's  
13 Model Jury Instructions, which the Ninth Circuit urges trial courts to use. Model  
14 Instruction 7.4 provides that:

15 The punishment provided by law for this crime is for the court to decide.  
16 You may not consider punishment in deciding whether the government has  
17 proved its case against the defendant beyond a reasonable doubt.

18 The Ninth Circuit has not signaled any willingness to revisit or undermine the legal  
19 principles contained in this instruction. One month ago, in September 2019, the Ninth  
20 Circuit Jury Instructions Committee reviewed and approved Model Instruction 7.4 for use  
21 in criminal trials. The Ninth Circuit has also recently rejected a challenge to the reading  
22 of this instruction in a criminal trial involving a mandatory minimum sentence. *United*  
23 *States v. Lynch*, 903 F.3d 1061, 1081 (9th Cir. 2018) (holding that *Shannon* “remains  
24 binding law,” and Model Instruction 7.4 is an accurate statement of that law).

25 The rationale for excluding evidence of punishment or the consequences of  
26 conviction is readily apparent: such evidence is not probative of guilt or innocence, the  
27 only question the jury is called upon to decide. Instead, evidence relating to the  
28 punishment and the effects of conviction serve only to confuse the jury and compromise  
the verdict. In *Shannon*, the Supreme Court explained the inherent risk attached to  
presenting a jury with this evidence in stark terms. “[P]roviding jurors sentencing

1 information invites them to ponder matters that are not within their province, distracts  
2 them from their fact-finding responsibilities, and creates a strong possibility of  
3 confusion.” 512 U.S. at 579.

4 Applying this rationale, it would be improper for the Defendant to argue or  
5 attempt to introduce evidence concerning the possibility of being incarcerated or the  
6 mandatory minimum sentence that he faces if convicted. *United States v. Feuer*, 403  
7 Fed. App’x 538, 540 (2d Cir. 2010) (holding that, absent exceptional circumstances, a  
8 “defendant has no legal right to introduce evidence or argument regarding sentencing  
9 consequences”). It would also be improper for the Defendant to argue or reference any  
10 collateral consequences he faces if convicted. Such evidence and arguments are not  
11 relevant to the charged offenses, and would serve only to draw the attention of the jury  
12 away from its chief function as the trier of fact and invite jury nullification.

## 13 II. CONCLUSION

14 For the foregoing reasons, the United States respectfully requests that the Court  
15 preclude evidence and argument related to the potential punishment faced upon  
16 conviction. Such argument and evidence are irrelevant to the ultimate issue of the

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1 Defendant's guilt or innocence and would only risk compromising the impartiality of the  
2 jury's verdict.

3 DATED this 18th day of October, 2019.  
4

5 Respectfully submitted,

6 BRIAN T. MORAN  
7 United States Attorney  
8

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10 MATTHEW P HAMPTON

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via e-mail and/or telefax.

s/ Lissette Duran  
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